No. 508

# UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT,

Northern District of California.

GEORGE W. REED, Administrator with the will annexed of the Estate of Catherine M. Garcelon, Deceased, and JAMES P. MERRITT,

*Appellants,*

vs.

JOHN A. STANLY, Trustee, etc., et al.,

*Appellees.*

Brief on behalf of the Appellees other than John A. Stanly, Trustee under a certain trust deed executed by Catherine M. Garcelon and bearing date the 21st day of April, 1891, and Asbury J. Russell, Peter L. Wheeler, and John A. Stanly, Trustees of the Samuel Merritt Hospital.

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IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT,

Northern District of California.

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GEORGE W. REED, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF CATHERINE M. GARCELON, DECEASED, AND JAMES P. MERRITT,

*Appellants,*

VS.

JOHN A. STANLY, TRUSTEE, ETC., ET AL.,

*Appellees.*

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**Brief on behalf of the Appellees other than John A. Stanly, Trustee under a certain trust deed executed by Catherine M. Garcelon and bearing date the 21st day of April, 1891, and Asbury J. Russell, Peter L. Wheeler, and John A. Stanly, Trustees of the Samuel Merritt Hospital.**

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The facts of this case are correctly stated in the appellants' brief, and they show that only one question of law is presented upon this appeal. That question is,

whether the court below erred in ruling that the complainants were not entitled to the relief prayed for in the bill of review, because of their laches and delay in the exhibition of said bill of review. It is true, as stated on page 20 of appellants' brief, that this ruling was made, not upon the authority of any decision or treatise, nor upon any express provision of statute, but solely as an original ruling. The case presented to the court below was one in which that court was called upon to lay down a rule of practice without the assistance of any direct adjudication or express provision of statute. The question presented to this Court is, whether the rule of practice so laid down is wrong.

The court below was confronted by a question of the same sort as that which confronted Lord Chancellor Camden in 1767 in *Smith* v. *Clay*, Ambler's Reports, 645. The Lord Chancellor was called upon in that case to determine, without the guidance of any statute or settled rule of practice, what was the length of time requisite to bar a bill of review. He laid down the rule, which has ever since been followed, that a bill of review is barred by the lapse of the same period of time which would bar a writ of error to review a judgment at law. At that time the period of time within which a writ of error could be brought was twenty years, and by analogy the same period was determined upon as the time within which a bill of review must be brought.

The present case, so far as we know, is the first case since the adoption of the Act of March 3, 1891, relating to appeals from the Circuit Courts of the United States, in which it has been necessary to determine what is the

length of time which will bar a bill of review. The court below held that the same considerations must hold good at the present time, which in the past have induced courts of equity, in fixing the time within which a bill of review must be brought, to follow the analogy of the time limited by statute for suing out a writ of error or taking an appeal; and that, in so far as the time allowed for taking an appeal has been shortened in any case by the provisions of the Act of March 3, 1891, relating to appeals from the Circuit Courts of the United States, the time within which a bill of review may be filed in any such case must be held to have been correspondingly shortened.

The question whether this ruling of the court below was wrong must be decided, we submit, without reference to the objection urged by the appellants, that the effect of the ruling is to render nugatory the right to file a bill of review. Counsel for the appellants seem to assume that every defeated litigant must have the right to file a bill of review. But it would hardly be contended that Congress could not, by express enactment, if it were so disposed, abolish altogether the so-called right to file a bill of review. And what Congress could do directly, it could do indirectly, by shortening the time allowed for taking an appeal. Therefore, there is no force in the argument that in most cases it would be physically impossible to file a bill of review at all, if the time allowed for doing so is to be limited, as the court below in the present case has limited it. The fact of the matter is, that the whole system of bills of review is foreign to modern ideas of jurisprudence.

Still less is there any force in the argument that the right to file a bill of review cannot be so limited because when so limited that right is no more effective than other modes which are open to a defeated party of obtaining a review of the question decided against him, as by motion, etc. If the effect of the provisions of the Act of March 3, 1891, relating to appeals from the Circuit Courts of the United States, should turn out to be to render the right to file a bill of review nugatory, it would be entirely in accord with the spirit of modern legislation, which favors the shortening and not the prolongation of the period of time within which litigated questions when once decided may be re-opened. Especially in regard to questions of the jurisdiction of the Circuit Courts, the intention of the Act of March 3, 1891, was obviously to hasten the determination of appeals. This intention would be defeated by any ruling different from that which was adopted by the court below.

On page 42 of the appellants' brief it is said that,—

"It is the misfortune of these appellants that, though each of them urged in due time and proper manner and repeatedly the objection that the case was not a controversy between citizens of different States and therefore not within the jurisdiction of the United States Circuit Court, the question was never actually considered."

But the fact is, that the appellants had ample opportunity to have the alleged refusal of the Circuit Court to consider the question of jurisdiction reviewed by the Supreme Court of the United States. The real misfortune under which they labored was that they failed to

pursue the proper procedure to obtain a review of that question by the Supreme Court. Because of their said failure to pursue the proper procedure their appeal to the Supreme Court upon the question of jurisdiction was dismissed, as is stated on page 4 of the appellants' brief. Having failed to pursue the proper procedure to obtain a review of the question of jurisdiction in the manner prescribed by the Act of March 3, 1891, they now seek by a bill of review to accomplish indirectly what they might have accomplished directly if they had complied with the terms of that Act. If they fail, after all, to obtain a review of the action of the Circuit Court of which they complain, they have only themselves to blame.

In order to understand the scope of the question presented for decision in this case it must be borne in mind, in the first place, that there has never been and is not now any statute of the United States, or rule of the Supreme Court of the United States, fixing the time within which bills of review must be filed. It is only *by analogy* to the statutes limiting the time for taking an appeal that any time has ever been fixed for filing a bill of review. This was expressly recognized in *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146, and the principle is more clearly stated in

*Shepherd* v. *Larue*, 6 Munford (Va.) 529;
*Gordon* v. *Ross*, 63 Ala. 363.

The statement made by counsel for the appellants that two years is the shortest possible time within which a party aggrieved is entitled to file a bill of review for

error apparent upon the face of the decree sought to be reviewed is true only in a qualified sense. It is true only in so far as that period of time is the time limited by statute for taking the first step required to be taken in order to procure a review by appeal of the decree sought to be reviewed by the bill of review.

Until June 1, 1872, the time limited by law for taking an appeal from the United States Circuit Courts to the Supreme Court of the United States was five years, and accordingly five years is the time which, in the cases decided before 1872, is spoken of as the time allowed for bringing a bill of review. (See, for example, *Kennedy* v. *Georgia State Bank*, 8 How. 586, 609.) In the cases decided during the period when the time allowed for taking an appeal to the Supreme Court was two years, two years is spoken of as the time within which a bill of review may be filed. But in none of the cases is it laid down as an absolute rule that a bill of review may be filed at any time within two years without reference to the time limited for taking an appeal.

We submit that in determining what length of time will bar a bill of review at the present time, the only analogy which can be followed is that of the statute now in force in reference to the time allowed for taking an appeal from the decree which is sought to be reviewed, and further that, in following the analogy of such statute, the Court is bound in each case to follow the analogy of the particular clause of the statute which applies to such case,—in other words, that where the time allowed by statute for taking an appeal is different in different classes

of cases, the time within which a bill of review may be filed in any particular case cannot be longer than the time allowed by the statute for taking the first step required to be taken in order to procure a review by appeal of that particular case.

At the time when the decree sought to be reviewed by the bill of review in this case was rendered, the time allowed for taking an appeal from a decree of a United States Circuit Court was not the same in all classes of cases. In certain classes of cases, not necessary to enumerate, appeals could be taken only to a Circuit Court of Appeals, and the time within which such an appeal could be taken was six months. In certain other classes of cases, which are enumerated in section 5 of the Act of March 3, 1891, an appeal could be taken only to the Supreme Court of the United States, and the time within which such an appeal could be taken was two years, except in those cases where the question to be reviewed was a question as to the jurisdiction of the Circuit Court. We submit that the time allowed for filing a bill of review in any case must be determined by the character of the questions sought to be reviewed, and by reference to the class into which the case falls, according to the classification adopted by the said Act of March 3, 1891. In no other way can the analogy between bills of review and appeals be preserved.

By the decision of the Supreme Court upon the second appeal in the original suit of *Bowdoin College* v. *Merritt* it has been conclusively determined that, aside from the question of the jurisdiction of the Circuit Court, which

question might have been raised upon the first appeal if that first appeal had been properly prosecuted, and which question was not open to consideration upon the second appeal, the suit of *Bowdoin College* v. *Merritt* involved *no* question which brought it within the appellate jurisdiction of the Supreme Court. It follows from this decision, and from the proposition that the time allowed for filing a bill of review in any particular case must be the same as the time allowed by statute for taking the first step toward procuring by appeal a review of the question sought to be reviewed by the bill of review, that there is no color whatever for the contention of the appellants that they were entitled to file this bill of review at any time within two years.

No question is involved in the suit of *Bowdoin College* v. *Merritt* of such character as to entitle the defeated party to a period of two years within which to take the first step toward having it reviewed by appeal. The next longest period of time allowed by the statute for taking an appeal from a decree of a Circuit Court is six months, that being the period allowed for appeals to the Circuit Courts of Appeal. Consequently the time within which it was open to the appellants to file a bill of review to review the original decree in *Bowdoin College* v. *Merritt* cannot have been longer than six months, and cannot have been as long as six months, unless some question was to be raised other than that of the jurisdiction of the Circuit Court.

The contention of the appellants that two years is the time limited by statute for taking an appeal upon the

question of the jurisdiction of the Circuit Court is based upon the assumption that the Act of March 3, 1891, giving the right to take such an appeal, is silent as to the time within which such an appeal may be taken, and that therefore Section 1008 of the Revised Statutes, which prescribes two years for all cases, applies. But the Act of March 3, 1891, is not silent as to the time within which an appeal involving a question as to the jurisdiction of the Circuit Court may be taken. That Act provides that in cases in which a question as to the jurisdiction of the Circuit Court is to be reviewed, a certificate of the question of jurisdiction shall be made by the Circuit Court.

This provision has been construed by the Supreme Court to mean that such a certificate must be made at the same term at which the decree was rendered.

*Colvin* v. *Jacksonville*, 158 U. S. 456.

The construction so given to the statute by the Supreme Court must be read into the statute with the same effect as though the limitation upon the right to obtain such a certificate had been expressed in the statute. And when the statute is so construed it is obvious that in this one class of cases it prescribes a different time for taking an appeal to the Supreme Court from that which is prescribed by Section 1008 of the Revised Statutes.

The argument of the appellants that the Act of March 3, 1891, does not repeal Section 1008 of the Revised Statutes merely begs the question; for Section 14 of the Act of March 3, 1891, expressly repeals

all former acts and parts of acts relating to appeals or writs of error inconsistent with the provisions of Sections 5 and 6 of that Act. It cannot be denied that as to certain classes of cases Section 14 of the Act of March 3, 1891, repeals Section 1008 of the Revised Statutes; and the question whether it repeals said Section 1008 as regards appeals upon questions of the jurisdiction of the Circuit Court, depends altogether upon whether or not said Section 1008 and the clause of Section 5 relating to appeals upon such questions of jurisdiction are inconsistent, which is itself the question under discussion.

The argument based upon the supposed hardship of the construction contended for is entitled to no weight. The question of jurisdiction is the first question which arises in any case, and it can rarely happen that the party against whom a final decree is rendered, and who is entitled to have the question of the jurisdiction of the Circuit Court reviewed, is taken by surprise by the decision of the Court upon the question of jurisdiction in its final decree. In *Bowdoin College* v. *Merritt* the final decree was not signed until more than four years had elapsed after the suit had been commenced, and *more than three years after the first decision of the Circuit Court upon the question of jurisdiction.* (The demurrers of James P. Merritt and Frederick A. Merritt to the original bill in *Bowdoin College* v. *Merritt*, on the ground of want of jurisdiction, were overruled on February 3, 1893, and the final decree was signed on June 18, 1896. Trans., pp. 252–3, 228.) Even where

a final decree involving a decision upon a question of jurisdiction is rendered on the last day of the term, the losing party is not remediless, for, as is pointed out in the appellants' brief, the right to obtain a certificate at a subsequent term can be kept alive by a motion for that purpose made before the expiration of the term at which the decree is rendered.

An argument is sought to be drawn in the appellants' brief from the analogy of bills of exception in actions at law, which must be signed at the same term at which the judgment in the action is entered, although a writ of error may be sued out at a subsequent term. It seems to be assumed, as too obvious for argument, that the right exists to sue out a writ of error after the term at which a judgment has been entered, in order to obtain a review by the Supreme Court of a question as to the jurisdiction of the Circuit Court, without reference to whether or not the right to do so has been kept alive by appropriate action during the term. But we fail to see what ground there is for saying that any such right exists after the term at which a judgment has been rendered. Certainly the case of *Lehigh Mining & Manufacturing Co.*, 156 U. S. 322, which is cited in the appellants' brief in this connection, furnishes no support for any such contention. We also fail to see why the rights of a losing party in an action at law to proceed by writ of error, after the term, should be supposed to be any clearer than the right of a losing party in a suit in equity to proceed by appeal after the term. The argument based upon the supposed hardship under which a losing party labors if

he is not allowed to file a bill of review at a subsequent term proves too much as applied to actions at law as distinguished from suits in equity, for it would lead to the conclusion that the losing party in such an action ought to be allowed to move for a new trial at a subsequent term.

To hold that in any case in which it is sought to have a question as to the jurisdiction of the Circuit Court reviewed by the Supreme Court, the defeated party, after procuring from the Circuit Court a certificate of the question of jurisdiction at the same term at which the final judgment or decree in such case is entered, can wait two years before taking an appeal, would be most unreasonable. But even if the appellants are right in their contention, that the full period of two years is allowed to a defeated party in which to take an appeal upon a question of the jurisdiction of the Circuit Court, it by no means follows that such defeated party is entitled to the full period of two years in which to file a bill of review upon the same question. We submit that the only point of time which can be taken as marking the latest time at which a bill of review can be filed must be the latest time at which the *first* step must be taken toward procuring a review by appeal of the question of jurisdiction. If the bill of review need not be filed within the same length of time as that within which the *first* step must be taken toward procuring a review of the question by appeal, what possible reason can be suggested for taking one point of time rather than another as marking the time within which a bill of review may be filed?

Why not allow the bill of review to be filed, for example, at any time before the time at which the appellants would have been obliged to docket their appeal in the Supreme Court? Unless the time allowed for taking the *first* step toward procuring a review of the question by appeal is taken as marking the time within which a bill of review must be filed, there is no use at all in attempting to follow the analogy of the statute.

It is said on page 35 of the appellants' brief that it is not requisite to the right to file a bill of review that the party should be able to take an appeal. With reference to this proposition, it is to be observed that neither *Ensminger* v. *Powers*, 108 U. S. 302, nor *Miller* v. *Clark*, 52 F. 900, which are cited in support of the proposition, purports to decide anything of the sort. *Miller* v. *Clark*, 52 F. 900, was a very peculiar case. The complainant in that case had filed a bill in equity, which was dismissed on the merits. She then took an appeal to the Supreme Court, which appeal was dismissed upon the ground that the sum involved was too small to give the Supreme Court jurisdiction of the appeal. It was a necessary consequence of this decision that the case was also not within the jurisdiction of the Circuit Court, and afterwards the complainant brought a bill of review to have the decree dismissing her original bill on the merits reversed, and to have a decree entered dismissing her original bill for want of jurisdiction. This relief was granted to her, she paying all the costs of all the proceedings. No question as to whether such a bill of review could be

filed after the time to appeal had expired arose in the case. for the original decree was signed in 1889, at a time when two years was the shortest time within which an appeal had to be taken in any case, and the bill of review was filed within two years thereafter.

Another argument which is urged by the appellants is that the question whether the time within which a certificate of the question of jurisdiction can be made has or has not elapsed, is immaterial to the right to file a bill of review, because such a certificate, while requisite to the remedy by appeal, is not required as a preliminary to the filing of a bill of review. It is doubtless true that no certificate is required as a preliminary to the filing of a bill of review, but that fact does not prevent the time within which the right to file a bill of review may be exercised from being the same as that within which the right to take the first step toward taking an appeal may be exercised.

Our contention is that a party aggrieved by the final decree in any suit in equity may either take an appeal to a higher court or file a bill of review in the same court, but that whichever procedure he follows he cannot have a longer time in one case than in the other in which to take the first step toward procuring a review of the decree of which he complains. If the ground of his complaint is that the court wrongfully entertained jurisdiction of the cause, and if he allows the time within which he might have successfully applied to the court for a certificate of the question of its jurisdiction to slip by without his taking any step toward procuring a review of the

decree, either in the same court or in some other court, his right to have the decree reviewed at all is lost.

As bearing upon the question of laches the appellants lay considerable stress upon the fact that the time between the rendition of the original decree and the filing of the bill of review, with the exception of a period of six months and two days, was taken up by the two appeals to the Supreme Court. The pendency of those appeals cuts no figure, however, upon the question whether the bill of review was filed in time. We do not concede that it is never true that a party can both take an appeal and also file a bill of review. Where the pendency of an appeal is a bar to the bringing of a bill of review, it is so only because the effect of the appeal is to remove the cause from the lower court to the appellate court.

*Ensminger* v. *Powers*, 108 U. S. 292, 302.

Where the cause remains in the lower court, there is no bar to the right to bring a bill of review.

*Trust Co.* v. *Locomotive Works*, 135 U. S. 207.

The Supreme Court has decided that the certificate of the question of jurisdiction provided for in Section 5 of the Act of March 3, 1891, is analogous to a certificate of division of opinion between the judges of a Circuit Court.

*Colvin* v. *Jacksonville*, 158 U. S. 456;
*Graver* v. *Faurot*, 162 U. S. 435, 437.

With reference to cases brought before the Supreme Court on a certificate of division of opinion, it has always

been held that only the points certified go up to the Supreme Court, and that for all purposes not connected with a review of those points the cause remains on the docket of the Circuit Court.

> *Kennedy* v. *Georgia State Bank*, 8 How. 586, 611;
> *Ward* v. *Chamberlain*, 2 Black. 430, 435;
> *Daniels* v. *R. R. Co.*, 3 Wall. 250, 255.

It follows that even if a certificate of the question of jurisdiction had been made by the Circuit Court in due time, it would not have had the effect to remove *the cause* from the docket of the Circuit Court, and would not have been a bar to a bill of review. That the cause would still have remained in the Circuit Court notwithstanding the making of such a certificate is further proven by the fact that if the decision upon the merits had been adverse to the original complainants, the pendency of an appeal by the defendants to the Supreme Court upon the question of jurisdiction would not have stood in the way of an appeal by the complainants to the Circuit Court of Appeals upon the merits.

> *Northern Pacific R. R.* v. *Glaspell*, 1 C. C. A. 327;
> *U. S.* v. *Jahn*, 155 U. S. 109.

But in point of fact the certificate which was made in *Bowdoin College* v. *Merritt* was not made in due time, and no certificate of the question of jurisdiction was made by the Circuit Court in that case until February, 1897, more than seven months after the rendition of the final decree. Therefore the appeal which was taken to the Supreme Court was ineffectual for any purpose, and

there was in point of fact no bar, at any time, to the filing of a bill of review.

*Maynard* v. *Hecht*, 151 U. S. 324.

On page 38 of the appellants' brief the point is made that the Act of March 3, 1875, expressly declares that if in any suit commenced in a Circuit Court, or removed from a State Court to a Circuit Court of the United States it shall appear to the satisfaction of said Circuit Court, *at any time* after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, etc., the said Court shall proceed no further therein, but shall dismiss the suit. It is argued therefrom that the right to file a bill of review making such facts appear to the Court cannot be limited to the term at which the final decree in such suit is rendered. But this argument proves too much, for, if it be true that section 5 of the Act of March 3, 1875, is to be construed as authorizing the Circuit Court to give relief *at any time*, then there is no limitation whatever upon the time within which a bill of review may be brought to review any question of the sort referred to in section 5 of that Act.

We submit, however, that the only sensible construction which section 5 of the Act of March 3, 1875, will bear is, that such a suit may be dismissed *at any time while it is pending*. Such seems to be the construction placed upon the section by the Supreme Court. For in *Ayers* v. *Wiswall*, 112 U. S. 187, 190, one of the

cases cited in the appellants' brief, it is said:—

"The order to remand can be made at any time *during the pendency of the cause* when it shall appear there is no jurisdiction."

And in *Morris* v. *Gilmer*, 129 U. S. 315, 326, the Supreme Court said:

"The Act of 1875 imposes upon the Circuit Court the duty of dismissing a suit if it appears at any time after it is brought and *before it is finally disposed of*, that it does not really and substantially involve a controversy of which it may properly take cognizance."

Such is also the construction placed upon the section by the judge who decided *Miller* v. *Clark*, 47 F. 850, for he said that the Act of March 3, 1875, does not relate to the duty of the court upon a bill of review, after a suit has been disposed of by final decree.

At some time in the history of every litigated case, however protracted, there must come a time when the issues of law, as well as of fact, are definitely closed for the purposes of that case. Even the question of the jurisdiction of the court must at some time cease to be open to review.

*Town of Andes* v. *Millard*, 70 F. 515.

We submit that in the case of *Bowdoin College* v. *Merritt* that time had arrived long before the present suit of *Reed* v. *Stanly* was commenced; and that the court below did not err in holding that the complainants had been guilty of such laches and delay in the exhibition of the bill of review herein that they were not entitled to

the, or any of the, relief prayed for therein. We ask that the decree appealed from be affirmed.

Respectfully submitted,

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Feb. 20, 1899.